United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

To be argued by
JOAN BERTIN LOWY

76-7062

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

MARIA NURSE, *et al.*,

Plaintiffs-Appellants,

DARLENE K. WILLIS, individually and on behalf of all others similarly situated,

Plaintiff-Intervenor,

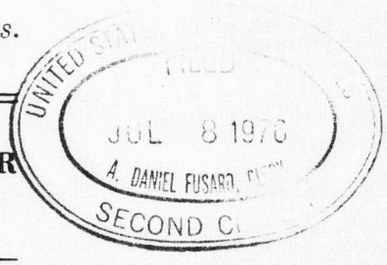
—against—

ALLIED MAINTENANCE CORPORATION, *et al.*,

Defendants,

SHEA GOULD CLIMENKO KRAMER & CASEY,

Appellants.



BRIEF *AMICUS CURIAE* OF PLAINTIFF-INTERVENOR DARLENE K. WILLIS

ISABELLE KATZ PINZLER
JOAN BERTIN LOWY
DIANA H. GREENE
ROBERT P. ROBERTS
NATIONAL EMPLOYMENT LAW PROJECT, INC.
423 West 118th Street
New York, New York 10027
(212) 866-8591
Attorneys for Plaintiff-Intervenor

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STATEMENT OF THE ISSUES

Do appellant law firm's two clients have divergent and conflicting interests as a result of one client's potential liability for legal wrongs suffered by the other?

Is appellant law firm precluded from simultaneously representing two clients with divergent and conflicting interests regarding the same dispute?

Did the district court's entry of a judgment settling this action render counsel's alleged conflict of interests moot, where the settlement agreement still requires the district court to approve the payment of attorneys' fees?

STATEMENT OF THE CASE

This is an appeal from an order dated February 18, 1976, issued sua sponte by the Honorable Charles E. Stewart, Jr., disqualifying the law firm of Shea Gould Climenko Kramer and Casey (hereafter referred to as "Shea Gould") from continuing to represent the plaintiffs herein. After a hearing on remand, the original order was supplemented by a Memorandum Opinion dated May 27, 1976.[1] Disqualification was based on a conflict of interests arising out of Shea Gould's simultaneous representation of two clients with divergent interests. Plaintiff-intervenor's interest in appearing as amicus curiae has already been set forth in some detail in her motion for leave to file a brief and appear as amicus curiae. Those reasons will not be separately stated here, but are incorporated by reference herein. Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, this brief is conditionally filed with the motion for leave to appear.

A. Factual Background

Plaintiff-intervenor Darlene K. Willis is one of

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1. Supp. A. 1-16. References are to the Supplemental Appendix submitted by plaintiff-intervenor. The abbreviation "A." refers to Appellants' Appendix. Citations to Plaintiffs' and Court Exhibits refer to items introduced at the remand hearing held on March 5, 11, and 12, 1976, unless otherwise specified.

approximately 11,500 female office cleaners working in office buildings in New York City who are also members of Local 32J of the Service Employees International Union, AFL-CIO (hereafter referred to as "Local 32J"). She is employed by Allied Maintenance Corporation (hereafter referred to as "Allied"), a cleaning contractor. In April of 1971, Mrs. Willis filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that her union and employer, among others, had discriminated against her in the terms and conditions of her employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended. On June 29, 1973 the EEOC issued a determination that there was probable cause to believe that Local 32J and Allied, among others, had engaged in unlawful sex discrimination and, in further violation of the law,[2] had harrassed Mrs. Willis in retaliation for her filing of charges. The EEOC's determination was based, in large part, on the collective bargaining agreements negotiated by Local 32J which provide less favorable terms and conditions of employment for women than for similarly-situated men.

The EEOC's attempt to conciliate failed, and Mrs.

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2. A copy of the EEOC's determination appears at Supp. A. 17-18. It should be noted here that charges filed by Mrs. Willis with the New York State Human Rights Division and with the National Labor Relations Board, cited in Plaintiff-Appellants' Brief After Remand (hereafter referred to as "Apps.' Brief) at 24 and 41 were substantially dissimilar to or narrower than those filed with the EEOC, and therefore have little relation to the present case.

Willis was issued a "Right to Sue" letter.[3] Thereafter, on February 26, 1975, she commenced a class action, Willis v. Allied Maintenance Corp., et al., 75 Civ. 955 (CES) (hereafter referred to as "Willis"), against her employer and its subsidiaries (Allied), against two employer associations (Realty Advisory Board on Labor Relations, Inc. (RAB) and Building Service League (BSL)), and against the unions, Local 32J (the predominantly female local), Local 32B (the predominantly male local) and the International of the Service Employees International Union, AFL-CIO. She alleged violations of her rights and those of her class under Title VII, violation by defendant unions of their duty of fair representation; and, individually, a violation of her rights under the equal pay provision of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. §206(d).

Prior to the filing of the Willis complaint but substantially after the EEOC's probable cause determination, Local 32J, a respondent before the EEOC and a defendant in the Willis action, began soliciting from its female members authorizations for its general counsel, Shea Gould, to represent such members in actions for violations of the Equal

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3. A copy of the Right to Sue letter dated January 24, 1975, is attached to plaintiff-intervenor's complaint as Exhibit "B."

Pay Act of 1963 (29 U.S.C. §206(d)).[4] A series of such actions, numbering more than seventy, were filed in late 1974 and early 1975; Nurse v. Allied Maintenance Corp., et al., 74 Civ. 4889 (CES) (hereafter referred to "Nurse") is one. The plaintiffs in these suits are represented by Shea Gould, which has been general counsel to Local 32J since at least 1959 and continues to serve in that capacity.[5]

Thus, Nurse and Willis are related in that each complains of sex discrimination in the building cleaning and maintenance industry in New York City. However, Nurse alleges only violations of the Equal Pay Act of 1963, while Willis alleges Equal Pay Act violations, violations of Title VII, and breach of the unions' duty of fair representation. Both employers and unions are named as defendants in Willis; Nurse named only employer defendants, although Local 32J was subsequently brought into the case by the employers as a third-party defendant.[6] Class action status was granted in the

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4. A. 043-046 (testimony of Joseph J. Baumann, President of Local 32J, hereafter referred to as "Baumann testimony"); Plaintiff's Exhibit 12, passim; and Supp. A. 36-37 (Affidavit of Bruce Hecker, Esq., submitted in opposition to Motion to Intervene, hereafter referred to as "Hecker Affid.," ¶11).

5. Supp. A. 75 (Transcript of proceedings before the district court on February 17 & 18, 1976, hereafter referred to as "Tr. 2/17-18/76"); and A. 105 (Baumann testimony).

6. While Shea Gould continues to act as general counsel to Local 32J, another law firm (Halperin, Shivits, Scholer, Schneider & Eisenberg) was engaged as counsel of record for Local 32J in these cases. However, attorneys for Shea Gould have appeared for Local 32J at various proceedings in Willis and Nurse; e.g., at the deposition of the President of Local 32J, Joseph J. Baumann, on August 12, 1976, in Willis. See ¶16B of the Affidavit of Isabelle

(cont'd.)

Willis case on February 17, 1976;[7] the Willis class by definition includes all plaintiffs in Nurse.

On or about February 27, 1976, Nurse and most of the other similar cases were settled on consent. Simultaneously, the claims raised in Willis against the employer defendants were settled, after court-approved notice to the class and opportunity to object. However, claims against the unions, specifically the claim for merger of the sex-segregated locals[8] and the equal access claims, were not settled and remain to be litigated.

B. The Background and Nature of the Conflict

As will appear more fully hereinafter, the alleged conflict arises out of Shea Gould's simultaneous representation

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6. (cont'd.) Katz Pinzler, dated August 28, 1975, submitted in support of the Order to Show Cause for Preliminary Injunction and Temporary Restraining Order filed on that date in Willis. The papers submitted with that application were made a part of the record herein by Order of the District Court, pursuant to F.R.A.P. 10(e), dated June 23, 1976. The district court has taken judicial notice of the proceedings in the Willis case, since they are so closely related to the matter currently before the Court. A. 147-148 and letter to Honorable Charles E. Stewart, Jr., from Joan Bertin Lowy, dated March 17, 1976, also made a part of the record herein by Order of the District Court.

7. The opinion was read into the record of proceedings in Willis and Nurse on that date. See Supp. A. 63-70.

8. See Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974) and NLRB v. Glass Bottle Blowers, Local 106, 520 F.2d 693 (6th Cir. 1975) indicating that maintenance of sex-segregated locals is a prima facie violation of Title VII and the National Labor Relations Act.

of both Local 32J, as its general counsel, and the Nurse plaintiffs, members of Local 32J. These two clients have divergent and conflicting interests, inasmuch as the union members allege employment discrimination based on unequal terms and conditions of employment incorporated in collective bargaining agreements negotiated by Local 32J with the assistance of Shea Gould. Thus the union has potential liability, as a signatory to discriminatory collective bargaining agreement, for the very wrongs alleged by its members. Shea Gould, by representing both, has conflicting obligations.

The conflict became apparent in late August of 1975, when plaintiff-intervenor's attorneys first learned that Nurse and other similar cases were close to settlement and that the settlement agreement required, among other things, that plaintiffs sign waivers[9] of certain rights secured by Title VII and the Equal Pay Act. Because plaintiff-intervenor's attorneys believed that the settlement perpetuated discrimination, and because the plaintiff-intervenor herself as well as class members had been approached to sign waivers of rights asserted in Willis but not in Nurse -- all without notice to Willis counsel -- plaintiff-intervenor's attorneys sought a Temporary Restraining Order and Injunction to prevent further

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9. A. 165-166.

solicitation of waivers and to invalidate waivers already obtained.[10]

Relief was sought in part on the grounds that Shea Gould had violated certain ethical restraints by soliciting waivers from individuals known to be represented by counsel. Shea Gould's involvement in the solicitation of waivers was confirmed by the settlement agreement itself which provided in Paragraph 10(b)(i) that "[t]he Union and its counsel will make immediate efforts to obtain the required and agreed upon releases, waivers, and consents," (emphasis added).[11] The motion was also based on plaintiff-intervenor's assertions that Shea Gould, as general counsel to Local 32J, had divided loyalties and could not represent the best interests of union members alleging employment discrimination partially created by collective bargaining agreements to which Local 32J was a signatory.

Concern over the possibility of a disadvantageous settlement in Nurse and its potentially damaging effects on the on-going Willis action prompted Mrs. Willis's Motion to Intervene[12] in Nurse for the limited purpose of participating

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10. The facts of this situation are detailed in affidavits of Isabelle Katz Pinzler and Darlene K. Willis, dated August 28, 1976, submitted in support of the application for a Temporary Restraining Order and Order to Show Cause for Preliminary Injunction made in Willis on that date. These papers were made a part of the Record on Appeal herein by Order of the District Court dated June 23, 1976.

11. Supp. A. 25.

12. The motion was dated September 25, 1975. The Amended Complaint in Willis was filed as plaintiff-intervenor's complaint in Nurse, even though intervention was only sought, and subsequently granted, for limited purposes.

in any settlement discussions. The motion to intervene was based in large part on the claim that plaintiff-intervenor's interests would not be adequately protected because of Shea Gould's conflict of interests. Simultaneously, because of new developments, plaintiff-intervenor sought a reconsideration of the district court's denial of the injunctive relief requested the previous month.[13] The proposed Nurse settlement, to which plaintiff-intervenor continued to object, had been rejected by the United States Department of Labor (DOL). In a letter dated September 10, 1975,[14] DOL stated that it could not approve the proposed settlement because that settlement deferred compliance with the Equal Pay Act for three years: "Since the Equal Pay Act has been in effect for over 10 years, and since it granted a specific grace period, which expired in 1965, we believe and have always maintained that additional grace periods do not constitute compliance with the Equal Pay Act."[15]

Subsequent to DOL's rejection of the first settlement proposal in Nurse, and with the assistance of DOL[16] and the EEOC,[17] the non-union parties in Willis and the parties in

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13. This motion was combined with the Motion to Intervene dated September 25, 1976.

14. Supp. A. 54-58.

15. Plaintiff-intervenor had objected to the settlement for this reason and numerous others which are set forth in some detail in the affidavits and briefs in support of the September 25, 1976 motions.

16. In a letter to Howard Lichtenstein dated November 12, 1976, Supp. A. 59, William J. Kilberg, Solicitor of Labor, reconfirmed that DOL's position on the first settlement proposal had not changed and offered "to assist in whatever way we can in a settlement of the pending suits."

17. The EEOC had moved to intervene. Their motion was granted in an opinion dated June 16, 1976.

Nurse agreed to try to settle the equal pay aspects of all the cases in a consistent and integrated fashion.[18] Because of the questionable effect of the waivers solicited in Nurse,[19] the parties in Willis and Nurse recognized that resolution of the Nurse action would prejudice rights asserted in Willis but not in Nurse, unless both cases were settled simultaneously on terms acceptable to the parties in Willis. The Nurse settlement, like the prior proposed agreement, was to be combined with an industry-wide collective bargaining agreement. The Nurse and Willis settlements were both to be presented to the district court for its approval on February 27, 1976.

However, on February 13, 1976, plaintiff-intervenor's attorneys received a notice of meeting[20] dated February 11, 1976, which had been sent by Local 32J to all members of the Willis class,[21] stating in pertinent part:

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18. Attempts by plaintiff-intervenor's attorneys and by the EEOC to negotiate a back-pay award for the Willis class greater that that agreed by the parties to the industry agreement were opposed, not only by the employers, who would have to pay the additional amounts, but also by Local 32J, through its general counsel Shea Gould. Supp. A. 48, ¶11.

19. Plaintiff-intervenor has consistently challenged the validity of such waivers. See, e.g., the memorandum in support of the Sept. 25, 1976, motion to intervene, pp. 25-32, and p. 7-8, supra.

20. A copy of the notice appears at Supp. A. 60.

21. Notice of the proposed Willis settlement, which had been approved by the district court, had been sent (in five languages) by defendant Allied, on or about February 9, 1976. The notice provided for a hearing at which any objecting class members could state objections to the court.

> You will probably also receive, if you have not already, a different notice from the attorneys for Darlene K. Willis about a so-called 'CONSENT DECREE.' We strongly believe that this so-called 'CONSENT DECREE' would provide lesser terms and conditions than the agreement we negotiated for you and would take away some of the conditions you have enjoyed for years. Because we want you to understand this, we have called this VERY IMPORTANT MEETING for February 18, 1976 at which time your attorneys will explain the difference and how the Willis 'Consent Decree' benefits Willis and Allied at your expense.
>
> Please be sure to attend this VERY IMPORTANT MEETING.

The phrase "your attorneys" in the notice referred to attorneys from Shea Gould.[22]

On February 17, 1976, plaintiff-intervenor moved for Shea Gould's disqualification. The motion alleged that Shea Gould and Local 32J had circulated to Nurse plaintiffs and Willis class members false and misleading information[23] about the proposed settlement in Willis in an apparent attempt to

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22. Supp. A. 50, ¶17.

23. There is no factual basis for the statement in the notice that the Willis settlement "would provide lesser terms and conditions than the agreement we negotiated for you and would take away some of the conditions you have enjoyed for years." In fact, a reading of both agreements indicates that just the opposite is true. The Willis Consent Decree vindicates important legal rights and offers opportunities not available under the Nurse agreement. See Supp. A. 50-52. Nothing contained in the Willis agreement deprived any member of the Willis class of any advantages allegedly available under the collective bargaining agreements. Although Local 32J and Shea Gould claimed that the Willis agreement had certain "defects," at no time did anyone from either Local 32J or Shea Gould contact any of the parties to the Willis agreement to seek clarification. In fact, a meeting between Allied, Local 32J and Shea Gould was scheduled for the morning of February 17, 1976, to attempt to resolve differences,

(cont'd.)

induce them to object to that settlement. Plaintiff-intervenor believed that these actions were contrary to the interests of the plaintiffs and class members, who might have been misled by reliance on counsel whose allegiance was at best divided between clients with conflicting interests, and by reliance upon a union which was a defendant in an action in which union members constituted the plaintiff class. As a result, members of the class might have been persuaded to reject a beneficial settlement which, if they were fairly and truthfully informed, they would approve. Plaintiff-intervenor believed that these actions were taken for the benefit of Local 32J and at the expense of its members and were part of an effort to discredit and thereby destroy the Willis settlement in retaliation against plaintiff for continuing to pursue claims against Local 32J (e.g., merger of sex-segregated unions and equal access claims), evidently to coerce plaintiff to abandon those claims. While the facts of the alleged conflict had been raised on prior occasions, disqualification had not been sought previously because other, more limited, remedies were available. This was no longer true.

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23. (cont'd.) but Local 32J and Shea Gould failed to appear. See A. 121. Contrary to Shea Gould's insinuations, Apps.' Brief at 6, the Memorandum of Understanding signed by parties to the Willis agreement was not a recognition of its inadequacies, but rather an attempt to quiet any fears, regardless of whether or not they were justified, as to the possible effects of the settlement.

A hearing was held on the motion on February 17, 1976.[24] After considerable discussion and debate, the hearing was adjourned until the following morning to permit Shea Gould to present evidence.[25] On the morning of February 18, 1976, Shea Gould indicated that they and Local 32J would consent to substantailly all the relief requested, and would "secure the withdrawal of 'objections [to the Willis agreement] which were previously obtained by Local 32J."[26] Plaintiff-intervenor thereupon agreed to withdraw the motion without prejudice to renewal on telephone notice. The district court accepted the withdrawal of the motion on the stated terms and then engaged in a discussion with Mr. Milton Gould of Shea Gould in which the Court questioned the propriety of Shea Gould's continuing representation of the Nurse plaintiffs.[27]

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24. The transcript of proceedings appears at Supp. A. 61-127.

25. Although the question of Shea Gould's conflicting interests had been first raised approximately six months earlier, Shea Gould had never submitted any evidence to refute plaintiff-intervenor's allegations.

26. Supp. A. 120 (Tr. 2/17-18/76).

27. The discussion appears in full at Supp. A. 124-127. The following is a representative excerpt:

> THE COURT: There are two notions, and I have had to deal with these myself -- one is the fact and the other is the appearance.
>
> MR. GOULD: The appearance was created after the fact.
>
> THE COURT: I have had to deal with this myself, and I have excused myself from a case in which I thought the fact did not justify it but the appearance was there.

(cont'd.)

Shortly thereafter Judge Stewart issued an order, sua sponte, disqualifying Shea Gould from continuing to represent the Nurse plaintiffs.

Shea Gould filed a notice of appeal dated February 20, 1976, and sought a preference and a stay. By order dated February 24, 1976, this Court granted a stay of the district court's order and remanded "for the limited purpose of adducing additional proof on the issue of disqualification."[28]

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27. (cont'd.)

Mr. Gould, I really have difficulty seeing how your firm can continue in this case.

MR. GOULD: Well, that is a matter we will have to solve, your Honor. That is a professional problem. I have had almost nothing to do with this.

THE COURT: Mr. Gould, I do not think it is a problem you have to solve. This is my view.

MR. GOULD: I appreciate your Honor's views, and I respect your Honor's views, and yet your Honor must recognize that in matters of professional conduct we have to make our own decisions and face the consequences for them.

THE COURT: Yes.

MR. GOULD: I take what your Honor says with all respect, and yet I must tell the Court in solving this problem it will be solved by the senior partners in my firm with a very careful apprehension of what is involved.

28. A. 004.

Hearings were held in the district court on March 5, 11, and 12, 1976.[29]

C. The Facts Supporting Disqualification

The evidence produced during the course of this complicated litigation reveals the following facts:

1. Shea Gould has been general counsel to Local 32J since at least 1959.[30]

2. Shea Gould represented Local 32J in Willis proceedings before the EEOC.[31]

3. Shea Gould assisted Local 32J in negotiating the collective bargaining agreements which control the terms and conditions of employment for the Nurse plaintiffs and the Willis class.[32]

4. The Equal Pay Act cases, including Nurse, were initiated by, and authorizations to sue[33] were obtained by Local 32J, which arranged to have its general counsel, Shea Gould, represent the plaintiff union members;[34] plaintiff

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29. By Order of the District Court dated March 2, 1976, all counsel were invited to appear as amici curiae at the remand hearing. Plaintiff-intervenor's participation at that hearing was thus substantially limited in scope and intent, as stated on the record. See Supp. A. 136-137 and 131.

30. Supp. A. 36-37 (Hecker Affid. at ¶11); Supp. A. 75, 91 and 40 (Tr. 2/17-18/76) and A. 105 (Baumann testimony).

31. A. 122. (Baumann testimony).

32. Supp. A. 75-76 (Tr. 2/17-18/76).

33. A. 164.

34. A. 043-044, 105-106 (Baumann testimony); Plaintiff's Exhibit 12, passim; Supp. A. 36-37 (Hecker Affid. at ¶11).

union members were not given a choice of counsel, nor were they informed that alternative remedies were available; the vote to initiate the lawsuits was combined with the vote to employ Shea Gould as counsel.[35]

5. The Nurse case presents only Equal Pay Act claims,[36] and only against employers, when the facts alleged clearly support other claims,[37] e.g., Title VII and breach of duty of fair representation, and claims against the union; see, e.g., the EEOC probable cause determination.[38] Shea Gould was responsible for deciding what claims to raise and which parties to sue, while at the same time acting as general

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35. A. 106 (Baumann testimony).

36. Shea Gould states that claims under the Equal Pay Act and not Title VII claims, were pursued because that was viewed as a more expeditious approach. The Hecker Affid. at ¶11, Supp. A. 36-37, cites the four years of administrative procedures pursued by Mrs. Willis as proof that a Title VII case is time consuming. However, a plaintiff is entitled to commence a Title VII suit within eight months of filing an EEOC charge, 42 U.S.C. §2000e-5(c) and (f)(1). Mr. Hecker testified, A. 078, that the lawsuits were first discussed late in 1973 and were filed in summer of 1974, a period of approximately eight mohths. Furthermore, under Title VII there would be no need to obtain individual consents to sue.

37. By limiting these actions, Shea Gould failed to allege all possible theories of recovery for the plaintiffs, even though the settlement agreement called for waivers of the very rights which were not pressed. A. 165-166.

38. Supp. A. 17-18.

counsel to Local 32J.[39]

6. In negotiations of Local 32J's most recent collective bargaining agreement and settlement of Nurse, Shea Gould spoke for both Local 32J and the Nurse plaintiffs.[40] In those same negotiations, Shea Gould represented Local 32J with regard to the third-party complaints against Local 32J;[41] as a result, Local 32J was released from third-party claims potentially amounting to more than $1,000,000.00.[42]

7. Local 32J and Shea Gould both agreed to a settlement[43] dated July 12, 1975, which failed to provide even minimal compliance with the Equal Pay Act.[44]

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39. Supp. A. 36-37 (Hecker Affid. at ¶11); A. 078-079 (testimony of Bruce Hecker, Esq. of Shea Gould) and 105 (Baumann testimony); Supp. A.10 (District Court Memorandum Opinion dated May 27, 1976, hereafter referred to as "District Court Opinion").

40. A. 138 (testimony of Marvin Dicker, Esq., of Proskauer Rose Goetz and Mendelsohn, counsel to many of the employer-defendants, hereafter referred to as "Dicker testimony").

41. A. 148 (Dicker testimony).

42. A. 156 (Dicker testimony). Mr. Baumann, President of Local 32J, previously testified that there are approximately 11,500 women in Local 32J, A. 026, each of whom was entitled to the $100.00 payment to which Mr. Dicker referred, A. 156.

43. Supp. A. 19-27, and see transcript of proceedings in Willis on September 3, 1976, made a part of the record herein by Order of the District Court dated June 23, 1976.

44. See n. 15, supra, and accompanying text. And see Corning Glass Works v. Brennan, 417 U.S. 188, 206 (1974).

8. Third-party complaints have been filed in Nurse against Local 32J. Shea Gould and Local 32J anticipated this[45] and Local 32J requested that its members indemnify it against possible liability for the discrimination alleged in Nurse.[46]

9. The collective bargaining agreements[47] negotiated by Local 32J with the assistance of Shea Gould are discriminatory on their face.[48] Under the 1968 BSL-32J agreement, "all female employees" were to receive $2.18 per hour while "all male employees" were to receive $2.50 per hour.[49] Under the 1971 BSL-32J agreement, maintenance cleaners I (female) were to receive $2.805 per hour, while maintenance cleaners II (male) received $3.1975 per hour.[50] Under the 1972 32J-RAB agreement, office cleaners (female) received $3.255 per hour,[51]

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45. A. 107 and 111 (Baumann testimony).

46. A. 064 (Baumann testimony) and Plaintiff's Exhibit 12, Minutes of General Membership Meeting held on December 14, 1974, at p. 10:

> We doubt that there would be any liability on the part of the union or its officers, but in the event the issue goes to court and the court rules in our favor and you get an increase of $65.00 a month in wages, and if the union is found liable to any degree, I believe that the members of this organization would agree to a limited assessment to satisfy any judgment that may be imposed upon the union that has secured equal pay for them.
>
> President Baumann asked for a motion to [this] effect....

47. The relevant collective bargaining agreements were introduced into evidence as Plaintiff's Exhibits 1, 3, and 5, and Court Exhibits A through I and L through P.

48. Supp. A. 11 (District Court Opinion).

49. Court's Exhibit A, at pp. 10-11.

50. Plaintiff's Exhibit 1, at pp. 10-11.

51. Court's Exhibit I, at p. 28.

while men under the 32B-RAB agreement received $3.7185 (in Class A Buildings).[52] These figures only indicate how the women's rates compare at the lowest pay levels; few if any women are employed in the higher paying positions which are populated almost entirely by men.

10. Local 32J failed to demand equal pay from the employer organization responsible for negotiating industry-wide terms and conditions of employment[53] until 1974[54] although the Equal Pay Act had been in effect for almost a dozen years, and Title VII had been in effect for ten years. The anti-discrimination clause incorporated in certain 32J agreements[55] is irrelevant in this context, since sex-based wage differentials also appeared in the very same contracts.[56] Likewise, the alleged equal pay provision negotiated by Local 32J with the BSL in 1971[57] in fact contains no reference to equal pay and merely repeats verbatim language which had been

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52. Court's Exhibit D, at p. 55.

53. A. 141-143 (Dicker testimony).

54. A. 095, et seq. (Baumann testimony), and A. 146 (Dicker testimony).

55. A. 159.

56. Supra, p. 18, and accompanying footnotes.

57. A. 048-051 (Baumann testimony).

in BSL-32J contracts since at least 1963.[58]

Thus, while Shea Gould claims that Local 32J, with their assistance, was in the forefront of the battle to achieve equal pay for female office cleaners in New York City, the facts indicate otherwise. Not only did the union fail until 1974 to demand equal pay from the only employer group empowered to grant it, but they were also willing to settle their equal pay lawsuits in terms which would defer equalization for three years. Even then, equal pay might not have been achieved since the agreement did not provide for continued equalization after the expiration of that contract.[59] In contrast, Shea Gould was to benefit substantially under the agreement's provision for $300,000.00 in attorneys' fees.[60]

Shea Gould asserts[61] that they and Local 32J are entitled to full credit for obtaining equal pay. Conveniently, they have neglected to mention that Darlene K. Willis has been

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58. A. 145-146. As Mr. Dicker's testimony indicates, this provision meant only that the BSL would pay whatever rates were later agreed upon by the RAB.

59. In return for these questionable benefits, the union and Shea Gould were willing to waive rights under both the Equal Pay Act and Title VII. See A. 165-166. Plaintiff-intervenor has consistently challenged the validity of such waivers. See n. 19, supra.

60. Supp. A. 22, ¶7(c).

61. Apps.' Brief at 23.

pressing this claim for over five years. Shea Gould suggests[62] that the first Nurse settlement is not really any different than the final settlement[63] because it does not cost the employers more money.[64] The important difference, of course, is that it provides the women more money, more quickly. Because an objectionable arbitration provision[65] was removed, the "inequity fund"[66] was unnecessary, and the money that would have gone there has instead gone directly to the women workers.

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62. Apps.' Brief at 25.

63. Local 32J took a different position when they presented the modified agreement to their members for approval in a notice dated January 26, 1976. (Plaintiff's Exhibit 14, p. 4) This notice stated:

"THE TOTAL ECONOMIC BENEFITS UNDER THE MODIFIED AGREEMENT ARE IN OUR OPINION EQUAL TO OR GREATER THAN ECONOMIC BENEFITS PROVIDED FOR IN THE [original] AGREEMENT YOU APPROVED [earlier]"

64. The suggestion in Apps.' Brief, at 16, that the Labor Department endorsed or promoted the employers' demand that the money amount not be increased is untrue and totally unsupported by the record.

65. Supp. A. 21-22, ¶7(b). To the extent that this provision (¶7(b)(vi) purported to provide the exclusive forum for determination, through arbitration, of all claims of unequal pay brought under the F.L.S.A., Title VII, or other law, it was invalid under Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

66. Supp. A. 21, ¶7(b)(i).

Finally, while Shea Gould credits itself and Local 32J with obtaining an equitable settlement,[67] it is apparent that the final settlement would not have been achieved without the participation of plaintiff-intervenor, DOL, and the EEOC in the revised settlement after plaintiff-intervenor and DOL had prevented finalization of the earlier objectionable settlement.[68]

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67. Apps.' Brief, at 42.

68. See Plaintiff's Exhibit 12, Minutes of General Membership Meeting held on Nov. 8, 1975, at pp. 4-5:

> "...President Baumann reported that, in connection with our Agreement with the RAB, perhaps some of our members are becoming a little impatient with the union because they have not received their wage increases and retroactive pay and are even blaming the union for their not having received their money. Some have even accused the officers of the union of losing all feeling for the members and concern for their problems.
>
> He wanted to the record straight in this regard and perhaps refre ur memories. It was the union and no one else -- not rlene Willis, not the EEOC, nor the U.S. Department of Labor who initiated our lawsuits for equal pay....
>
> However, in the middle of September, following objections raised by the attorneys for Darlene Willis, the Labor Department rescinded its July ["no objection"] letter....
>
> Therefore, Darlene Willis is responsible to a very great extent for our Agreement having been held up in the Labor Department! Therefore, Darlene Willis is responsible to a very great extent for your not receiving your wage increase yet."

ARGUMENT

I. Local 32J and the Nurse Plaintiffs have Different and Conflicting Interests.

A. Local 32J is Potentially Liable To the Nurse Plaintiffs for the Alleged Discrimination, and such Potential Liability is not affected by the Union's Claims of Good Faith.

The collective bargaining agreements negotiated by Local 32J prescribe the wages, terms and conditions of employment for union members. The simplest and most basic claim raised in both Nurse and Willis is that women employees are paid less for their work than are similarly situated male employees.[69] The wage scales at issue are contained in the collective bargaining agreements negotiated by Local 32J with the assistance of its general counsel Shea Gould.[70] On their face, the collective bargaining agreements incorporate discriminatory terms and conditions of employment.[71] Solely on the basis of the collective bargaining agreements to which it was a signatory, the union has potential liability for the alleged discrimination.[72]

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69. See Plaintiff-intervenor's Amended Complaint, e.g., ¶¶13-15, and Nurse Amended Complaint, e.g., ¶37.

70. Supp. A. 75-76 (Tr. 2/17-18/76).

71. See pp. 18-19, supra, and accompanying footnotes.

72. Apps.' Brief at 22 states: "Shea Gould's negotiation of the collective bargaining agreements results in a conflict only if Shea Gould, to prove plaintiffs' case, must allege that the agree-

(cont'd.)

As a matter of law, the fact that the union may not have intended to discriminate would not exonerate the union or excuse it from liability, since liability can be established merely by a showing of discriminatory effect: "good intent or absence of discriminatory intent does not redeem [discriminatory] employment procedures." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Title VII is directed "to the consequences of employment practices, not simply the motivation." Id. Lack of intent to discriminate, therefore, provides no defense to charges of discrimination. See also Rios v. Enterprise Ass'n. Steamfitters Local 638 of U.A., 501 F.2d 622, 629 (2d Cir. 1974); Palmer v. General Mills, Inc., 513 F.2d 1040, 1042 (6th Cir. 1975); Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973). Likewise, good faith is not a defense to financial liability for discrimination. See, e.g., Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 2374 (1975).

In similar situations, unions defending on the basis

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72. (cont'd.) ments are discriminatory." In essence, Shea Gould is contending that if the Nurse claims can be proven through means other than the collective bargaining agreement, there is no conflict. This is patently absurd, since it would allow Shea Gould to define itself out of a conflict by simply using other evidence to show discrimination which is more conclusively proved by the collective bargaining agreements.

of their good faith[73] have been found liable for discrimination because they were signatories to discriminatory collective bargaining agreements:

> The union vigorously contends that the mere fact that it was a party to a discriminatory collective bargaining agreement is legally insufficient to impose back pay liability....
>
> The union contends that the employer was the real instigator of the discriminatory evils established here and that it was merely a passive observer.... Common sense demands that a union be held to the natural consequences of its labors in negotiaitng a collective bargaining agreement.
>
> Guided by the facts of this case it would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381 (5th Cir. 1974).

See also Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372, 1377 (5th Cir. 1974); United States v. International Bro'hood of Elec. Workers, 428 F.2d 144, 151 (6th Cir.), cert. denied, 400 U.S. 943 (1970). Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973).

Moreover, numerous courts have held unions financially

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73. Although it is irrelevant to the issue of the union's potential liability to the Nurse plaintiffs, which, as indicated infra, exists notwithstanding the union's good or bad faith, the facts of this case indicate that the union has not acted in good faith. See pp. 15-22, supra, indicating that the union's efforts to vindicate its members legal rights were limited, at best.

liable to their members to compensate them for injuries suffered as a result of discrimination.[74] See, e.g., Russell v. American Tobacco Co., 528 F.2d 357, 366 (4th Cir. 1975), cert. denied sub nom Tobacco Workers Internat. Union v. Russell, 44 U.S.L.W. 3593 (U.S. April 19, 1976) (No. 75-1087); United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., supra; Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), cert. dism., 404 U.S. 1006 (1971).

With regard to liability for discrimination, good faith, good intentions, and even ameliorative acts are not enough.

> [T]he problem is not whether the employer has willingly--yea, even enthusiastically--taken steps to eliminate what it recognizes to be traces or consequences of its prior

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74. Shea Gould implies, A. 158 and Apps.' Brief at 32, that the union should not be held financially liable because the money would simply come from the union's treasury. This ignores the fact that the union officers were named in their individual as well as in their official capacities in some third-party complaints, and that any financial recovery might come from them personally or from other union resources, such as Local 32B and/or the International. Even if union members were compensated for their legal injuries by funds from Local 32J's treasury, they would still be benefitted. The employee-union member who has suffered discrimination would no doubt prefer to have the money in her own pocket as opposed to the union treasury. Notwithstanding Local 32J's attempt to indemnify itself, see n. 46, supra, and accompanying text, it might well be a breach of the union's fiduciary obligation to assess its membership in order to pay amounts due to the membership for violation, by the union, of the members' legal rights. See 29 U.S.C. §501.

> pre-Act segregation practices. Rather, the question is whether on this record--and despite the efforts toward conscientious fulfillment--the employer still has practices which violate the Act. In this sense, the question is whether the employer has done enough. Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972).

The same standard applies to union defendants. In United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975), the Court noted that the union had emphasized its "efforts to eradicate past discrimination. They point out that in 1970 Article 38, a non-discrimination clause was added to the National Master Freight agreement. But as with the employer, the issue is not simply what has been done but whether what has been done is enough." Id. at 316.

Local 32J cannot escape potential liability for the discrimination resulting from the terms of the collective bargaining agreements by alleging that it was unable to achieve better terms for its members. Whatever the reason, it is clear that neither unions nor employers can hide behind the collective bargaining process in an attempt to excuse employment discrimination.

> The rights assured by Title VII are not rights which can be bargained away--either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. Robinson v. Lorillard Corp., supra at 799.

Likewise, rights guaranteed by the Fair Labor Standards Act, including the Equal Pay Act, cannot legally be bargained away. See, e.g., D.A. Schulte v. Gangi, 328 U.S. 108 (1946); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).[75]

Recognizing the possibility that collective bargaining agreements might have to be modified in order to comply with the provisions of the Equal Pay Act of 1963, the effectiveness of the Act was deferred for two years in such situations. See 29 C.F.R. §800.101. This is

> ...indicative of the legislative intent that in situations where wage rates are governed by collective bargaining agreements, unions representing the employees shall share with the employer the responsibility for ensuring that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions. Thus, where equal work is being performed within the meaning of the statute, a wage rate differential which exists

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75. Since these legally guaranteed rights cannot be bargained away, they are not the proper subject of collective bargaining. See, e.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 858 (5th Cir. 1975), cert. denied, 44 U.S.L.W. 3593 (U.S. April 19, 1976) (Nos. 75-1005 and 75-1008). Thus, the fact that Local 32J "had the same objective in collective bargaining as they had in bringing these lawsuits" (Apps.' Brief at 25) raises some interesting questions regarding Shea Gould's, and Local 32J's actions in making the equal pay claims a primary subject of negotiation. As noted supra, p. 9, the first agreement negotiated by Shea Gould and Local 32J compromised those claims. What is apparent is that both Shea Gould and Local 32J saw the equal pay cases merely as a tool in the collective bargaining process. This notion cannot be legally justified.

> between male and female employees cannot be justified on the ground that it is a result of negotiation by the union with the employer, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment. 29 C.F.R. §800.106.

Thus, all the allegations of the union's good faith and hard work on behalf of its members are irrelevant to the issue of the union's potential liability. That potential liability exists if discrimination has occurred, a fact which has been substantially admitted by Local 32J's President,[76] and if the collective bargaining agreements incorporate or perpetuate the discrimination in any way. A glance at the disparate wage scales for men and women reveals that this, too, is true.[77]

B. A Finding of Actual Liability by the Union is Unnecessary in Order to Find That the Union and its Members have Different and Potentially Conflicting Interests.

It is not necessary to determine at this stage whether or not the union has actual liability; the presence of potential liability is sufficient to find that the union has a conflict of interests vis-a-vis its members.[78] See

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76. A. 041-042 and 047 (Baumann testimony) and see Supp. A. 11 (District Court Opinion).

77. See p. 18, supra.

78. Plaintiff-intervenor has consistently taken the position that the union's actual liability can only be determined after full discovery and trial on the merits in Willis. Thus she submitted

(cont'd.)

Communication Workers of America v. New York Telephone Co., ____F.Supp.____, 8 E.P.D. ¶9542, at p. 5359 (S.D.N.Y. 1974), Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 84 (S.D.N.Y. 1973), Amalgamated Meat Cutters of No. Am. v. Safeway Stores, Inc., 52 F.R.D. 373, 375 (D. Kan. 1971). In the Communication Workers case, in which a disability plan was alleged to be discriminatory, the question of conflict between the union and its members arose in the context of class certification:

> In resolving this troublesome question, it is unnecessary to determine the factual issue of whether or not [the union] acquiesced or joined in the alleged unlawful and discriminatory practices and policies complained of by the employees. Whatever the answer to that issue, the record sufficiently establishes that the union's interest is not co-extensive with that of the members of the class. Because the coverage of the company disability plan is often the subject of collective bargaining, the union is by no means the best representative of the class. [Citations omitted.] 8 E.P.D. at pp. 5358-5359.[79]

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78. (cont'd.) no evidence going to this issue at the remand hearing, but confined her participation to supplementing the record on the issue of the union's potential liability. See n. 29, supra.

79. Shea Gould alleges, Apps.' Brief at pp. 38-39, that "Judge Tyler had before him [in the Communication Workers case] the very contention which has been made in this case." That is inaccurate. The contention before Judge Tyler was that the named plaintiffs could not adequately represent the class under F.R.C.P. 23 because they were represented by CWA's counsel. Thus, defendants were seeking merely to defeat a class action motion. Shea Gould cites nothing to indicate that disqualification based on conflict was ever sought, or that the facts supporting such a claim were ever presented to the district court. In fact, the quotation in Shea Gould's brief, at p. 39, indicates that the facts were alleged "on

(cont'd.)

The same conclusion was reached in Lynch v. Sperry Rand, supra. The court noted certain problems in interpreting the collective bargaining agreements and in evaluating the union's responsibility, holding:

> There is at least a serious question as to whether the plaintiff unions may be legally liable directly to the male employee class for damages suffered from pension plan discrimination resulting from the collective bargaining agreements negotiated and entered into by the unions. This would place the unions in direct conflict with the interests of the class membership.
>
> I do not pass here on the ultimate merits of the questions which these contentions may raise. It is too early in the litigation to do so. It is apparent, however, from what appears on the record at this stage, that there are serious potential conflicts of interest between the union plaintiffs and the class which they seek to represent. 62 F.R.D. at 84.

This is the only logical and reasonable approach to a conflict problem in this context. It would be anomalous if a showing of actual liability were necessary before a trial court could disqualify counsel: the full trial on the merits, with the participation of the attorneys allegedly in conflict,

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79. (cont'd.) information and belief." Judge Tyler made no findings on this issue, other than the ones contained in the opinion cited above by plaintiff-intervenor. It is therefore improper and inaccurate to state that he ruled against the proposition at issue here. Even if the same issue had been presented, without the Judge's opinion, no conclusions could be drawn; the claim might have been rejected because of an inadequate factual showing or other reasons not relevant here.

would have to precede disqualification. No doubt this is one reason why the law, in this and other circuits, requires only a showing of apparent or potential conflict to justify disqualification of counsel. See, e.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976), and pp. 41-42, infra.

C. Because of its Potential Liability Local 32J has Interests Different from and in Conflict with those of the Nurse Plaintiffs

It is obvious that since the union has potential liability for the challenged discrimination, its interests are different from and in potential conflict with those of the Nurse plaintiffs. The union has a legal interest in protecting itself from liability; the plaintiffs have an interest in vindicating their legal rights and in obtaining the full measure of relief to which they are entitled. Thus, while it was in the union's best interests to limit the grounds upon which the Nurse plaintiffs sued and to exclude itself as a defendant, it was in the plaintiffs' best interest to expand those grounds and to seek relief from as many parties with potential liability as possible.

The nature of the conflict is most graphically demonstrated by Local 32J's request that its members indemnify it for any liability the union might have for violating its members' legal rights.[80] This action by

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80. See n. 46 supra, and accompanying text.

Local 32J, in derogation of the legal rights and interests of its members -- suggesting that they should pay for the violation of their own rights -- reveals the fact and extent of the conflict between the union and its members.

Further evidence of the potential conflict between the union and its membership is apparent from the existence of the employers' third-party complaints in Nurse and the cross-claims in Willis. Moreover, the manner in which the Equal Pay Act cases were brought suggests that a conflict may have existed from the very outset to the extent that the actions taken by Local 32J and Shea Gould were geared more to protect the union than its female members: Local 32J and Shea Gould engineered the initiation of the Equal Pay Act cases; Local 32J solicited the consents to sue from its members; Local 32J and Shea Gould arranged for Shea Gould to represent the plaintiffs; alternative counsel was never suggested; Shea Gould was responsible for the decision to sue only under the Equal Pay Act and to name as defendants only the employers; all of this occurred after Darlene K. Willis had received from the EEOC a determination, issued on June 29, 1973, that there was probable cause to believe that her rights under Title VII had been violated by both Local 32J and her employers.[81]

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81. See pp. 15-20, supra, and accompanying footnotes.

Shea Gould, however, suggests that an identity of interests between the union and its members[82] exists and therefore its representation of both is appropriate. Shea Gould cites the fact that "the vast majority of Local 32J's members are female,"[83] to support the proposition that both the union and its members are united in the common goal of eliminating sex discrimination. Aside from the fact that this very segregation into local unions dominated by one sex or the other is in itself a violation of law,[84] this argument begs the question: would union members represented by independent counsel have sued the union along with the employers once they were informed that the union was potentially liable?[85] The most that can be said about the alleged unity between the union and its members is that the members were never adequately informed of their rights and the union's obligations.[86] Their

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82. Apps.' Brief at 32, et seq. Contrary to Shea Gould's implications, no "members" of Local 32J ever went personally to Shea Gould for assistance in this case. The cases were conceived, designed and commenced solely by union officials and Shea Gould. A. 043, 044, 105, and 106 (Baumann testimony).

83. Apps.' Brief at 32.

84. See n. 8, supra.

85. Alternatively, would independent counsel have advised members of Local 32J to sue the union along with the employers, even if the members were not previously aware that the union was potentially liable?

86. Union members were only informed of the union's potential

(cont'd.)

counsel should have done so, but was apparently inhibited by a conflicting obligation to Local 32J. Similarly, the fact that the "negotiating committees included women"[87] does not create an identity of interests between the union and its members, nor is it an excuse for discrimination. Women are not insulated from liability for discriminating on the basis of sex. Shea Gould's assertion that the agreements were ratified by the membership[88] is likewise irrelevant; it is also misleading. President Baumann testified that attendance at union meetings runs from about 900 to 2000 members[89] out of a total of approximately 11,500.

In further support of its argument that Local 32J and the Nurse plaintiffs have united interests, Shea Gould alleges that the equal pay cases initiated by Local 32J and Shea Gould were more beneficial to union members alleging discrimination than the type of proceeding brought by Mrs. Willis. The contention[90] is that the Willis complaint,

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86. (cont'd.) liability when the union sought indemnification in December 1974 (A. 064 and see Apps.' Brief at 23), although the union had been advised of its potential liability when the plan to commence equal pay actions was originally conceived early that year. A. 107 and 111 (Baumann testimony).

87. Apps.' Brief at 32.

88. Id.

89. A. 126-127.

90. Apps.' Brief at 21-22.

by alleging violations of Title VII, admits that the sex-based differential is justified. This argument only demonstrates Shea Gould's lack of understanding of the relationship between the Equal Pay Act and Title VII, and the fact that Title VII may be used to vindicate equal pay claims, as well as equal access claims. See, e.g., Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970):

> Although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act .... Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of §703(h) would undermine the Civil Rights Act.

The claim that women have been systematically excluded from certain job categories,[91] in violation of Title VII, has absolutely nothing to do with the claim that the work woemn perform is equal in skill, effort, and responsibility to that of men in analogous positions. This lack of familiarity with the law of employment

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91. The "office cleaner" (female) job is comparable to the "porter" (male) job. However, no female analog exists for higher paying positions such as handy man, elevator starter, et al., which are filled almost exclusively by males. See the collective bargaining agreements negotiated by Local 32B, Court Exhibits L through P.

discrimination is compounded by Shea Gould's argument[92] that omitting the claim that the collective bargaining agreement is discriminatory would somehow protect job content. First, there is no logical causal connection between the failure to allege discrimination in facially discriminatory agreements and protection of job content. Moreover, Shea Gould is apparently unaware that any change in job content or other condition of employment occurring as a direct result of equal pay claims would constitute unlawful retaliation. See 29 U.S.C. §215(a)(3).

Finally Shea Gould claims that the fact that one union member is disgruntled and raises "tenuous"[93] claims does not mean that the union's interests are in conflict with those of other members. It is astonishing that attorneys who claim to be advocates for the Nurse plaintiffs can take the position that Mrs. Willis's claims, the very claims they had raised against the employers in Nurse, are "tenuous." They cite Walker v. Columbia University, ____ F.Supp. ____, 11 E.P.D. ¶10,835 (S.D.N.Y. 1976), appeal pending 76-6071, for the proposition that the

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92. Apps.' Brief at 22.

93. Apps.' Brief at 41. See n. 2, supra, regarding the lack of relevance to the present case of Mrs. Willis's previous administrative complaints.

Equal Pay Act was not violated by Columbia University's sex-based wage differentials. Thus, Shea Gould is arguing against the precise proposition that it is obligated to take in support of the Nurse plaintiffs' claims.[94] Apparently, in their zeal to protect their other client, Local 32J, from liability, they have forgotten their obligations to the plaintiffs herein.[95] In like fashion, Shea Gould states that "it appears to be well settled law that that statute [the Equal Pay Act] creates no liability on the part of the union."[96] Conscientious advocates for the Nurse plaintiffs would not concede this point so cavalierly, especially since there is authority to the contrary. See Hodgson v. Sagner, Inc., 326 F.Supp. 371 (D.Md. 1971), aff'd sub nom Hodgson v. Baltimore Regional Joint Board, Amalgamated Clothing Workers of Am., 462 F.2d 180 (4th Cir. 1972), 29 C.F.R. §800.106, and 29 U.S.C. §206(d)(2), a part of the Equal Pay Act, which provides:

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94. Interestingly, Shea Gould does not cite Brennan v. Goose Creek Consol. Indep. School Dist., 519 F.2d 53, (5th Cir. 1975), Brennan v. Houston Endowment, Inc., ___F.2d___, 10 E.P.D. ¶10,401 (5th Cir.), cert. denied, ___U.S.___, 96 S.Ct. 192 (1975), or the many other cases supporting Mrs. Willis's equal pay claims and those of the Nurse plaintiffs.

95. Some of the Equal Pay cases have not yet been settled. See ¶7, Affidavit of Milton Gould, sworn to May 25, 1976, in support of Motion for Preference.

96. Apps.' Brief at 42.

> No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

While the Nurse plaintiffs may not be served by Shea Gould's argument on those points, it is certainly in the union's interest to contend that it has no liability under the Equal Pay Act. However, these arguments do suggest why Local 32J and Shea Gould brought only equal pay claims in Nurse, and not Title VII claims. Under Title VII, the union's liability is more direct and more clearly apparent. See Rios v. Enterprise Ass'n Steamfitters, Local 638, supra, Johnson v. Goodyear Tire & Rubber Co., supra, among numerous other cases. See also pp. 24-28, supra.

II. Shea Gould is in an Untenable Professional Position, in Contravention of Canons 5 and 9 of the Code of Professional Responsibility, by Virtue of its Continuing Dual Representation of Clients with Conflicting Interests.

Local 32J's interests are different from and in conflict with those of its members complaining of employment discrimination. As a result, Shea Gould's representation of both Local 32J, as general counsel, and of its union members, the Nurse plaintiffs, places it squarely between conflicting interests. As one court, faced with a strikingly similar situation, phrased it,

> ...because of the very nature of the conflict which exists between the interests of the union plaintiffs and the interests of the individual class members, the present attorneys for the plaintiffs are placed in an untenable professional position. Obviously, they can no longer represent both the individual class representatives and the union plaintiffs. Their representation of one or the other must necessarily cease. Lynch v. Sperry Rand Corp., supra, at 84.

Canon 5 of the Code of Professional Responsiblity speaks to this problem:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. EC 5-14.

One court which examined the requirements of the canons of professional ethics in a similar situation, stated:

> '...a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.' Tucker v. Shaw, 269 F.Supp. 924, 927, n. 6 (E.D.N.Y. 1966), aff'd. 378 F.2d 304 (2d Cir. 1967).

In the present case, on the one hand, Shea Gould had an obligation to protect its long-standing client, Local 32J, from liability for its actions in negotiating allegedly discriminatory collective bargaining agreements. On the other hand, Shea Gould had an obligation to the Nurse plaintiffs who seek to redress violations of rights potentially caused, in part, by Local 32J, and to recover for injuries suffered. The obligations to these two clients place Shea Gould in an untenable professional position.

The case law in this Circuit leaves little doubt that disqualification was appropriate in this case. Disqualification is required to avoid even the appearance or the possibility of impropriety. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973). Canon 9 of the Code of Professional Responsibility requires that "a lawyer should avoid even the appearance of professional impropriety." Especially "[w]here the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or dimunition in the vigor of the [the attorney's] representation." Cinema 5, Ltd. v. Cinerama, Inc., supra at 1387 (citations omitted). "Moreover in the disqualification situation, any doubt is to be resolved in favor of disqualification." Hull

v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975).

A number of trial courts have recognized the inherent potential conflict of interests between a union (and its counsel) and union members when the union has negotiated contracts which incorporate allegedly discriminatory provisions. In Communications Workers of America et al. v. New York Telephone Co., supra, the union was denied the right to act as a class representative for its membership because the union participated in negotiating the allegedly discriminatory collective bargaining agreement. The court found that "the union's interest is not co-extensive with that of the members of the class. . . . The potential conflicts of interest taken in combination are sufficiently serious and compelling to preclude a finding that [the union] will fairly and adequately protect the class interests." 8 E.P.D. ¶9542, at p. 5359 (citations omitted).

Faced with the same situation and the added complicating factor, also present here, that the union's attorneys were also attorneys for the individual class representatives, the district court first found that the union could not represent the class because of "the potential conflicts of interest." Lynch v. Sperry Rand Corp., supra at 84. The court then proceeded to disqualify the union attorneys from representing the individual class representatives. See also Amalgamated Meat Cutters of North

America v. Safeway Stores, Inc., supra at 375. These cases make clear the fact and nature of the conflict of interest which may exist between a union and the members of its bargaining unit when the union is potentially liable for alleged discrimination. Likewise, it is apparent from these cases that arrangements made by the union to have its attorneys act for the complaining members of the bargaining unit are suspect. Such arrangements merely perpetuate and aggravate the conflict of interest between the union and the employees it represents. As the cited opinions indicate, disqualification is the proper remedy to protect the interests of the union members.

The Court of Appeals for the District of Columbia has taken much the same view. Reviewing a complex series of opinions arising out of charges made against officers of the United Mine Workers Union for misuse of union funds, the Court reviewed the holdings of its previous decisions ordering disqualification of the union's counsel as counsel to the defendant officers:

> We deemed 'critical' the fact that counsel in each case were representing or had 'represented to some extent union officers who are accused of wrongdoing in this case.' What primarily concerned us was the strong possibility of a conflict of interest created by those affiliations.... Weaver v. United Mine Workers of America, 492 F.2d 580, 583 (D.C. Cir. 1973).

The Court clearly was concerned that the pre-existing relation-

ship between the defendant officers and the union's general counsel might compromise its ability to act in the best interests of the union. Likewise, here, the pre-existing and continuing relationship between Shea Gould and Local 32J renders Shea Gould's representation of union members with adverse interests, in the words of this Circuit, "prima facie improper." Cinema 5, Ltd. v. Cinerama, Inc., supra.

The theory underlying disqualification for conflict of interest was enunciated in Emle Industries, Inc. v. Patentex, Inc., supra:

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. 478 F.2d at 571.

While the Court in Emle was concerned lest the lawyer involved reveal confidences of a previous client, the principle is fully applicable to the present case. The Court's holding in Emle suggests this Circuit's rigorous approach to the conflict problem: disqualification is required whenever the appearance of a conflict exists. See, e.g., Hull v. Celanese Corp., supra.

The Fifth Circuit has recently addressed this issue in a case strikingly similar to the present one. In Re Gopman, 531 F.2d 262 (5th Cir. 1976) also involved a claim of unethical conduct resulting from an attorney's simultaneous

representation of two clients with adverse interests. The case arose when certain union officials were called to testify before a grand jury investigating the union's compliance with provisions of the Labor Management Reporting and Disclosure Act. The union officials sought advice from the union's retained counsel, a Mr. Gopman. Subsequently, on Gopman's advice, the officials invoked their Fifth Amendment rights and refused to answer questions or to produce records. Thereafter the government filed a motion for disqualification based on Gopman's dual representation of the union and its officials. The Fifth Circuit ruled first, as to the government's standing to raise the conflict question:

> When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. Nor is there any reason why this duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical behavior. 531 F.2d at 265-266. [Citations omitted.]

On the merits, the Court upheld the district court's disqualification order, citing "the possibility of a conflict," Id. at 266, which arose because the attorney was responsible for protecting the union's interests, which "will generally be in the fullest possible disclosure," Id., while at the

same time "advising the unions' own officials on whether to produce the records...." Id. Stated slightly differently,

> the conflict arose when, on the one hand, the interests of appellant's union clients pointed towards disclosure, but, on the other hand, appellant was advising the individual witnesses as to whether disclosure should be made.... Whatever the eventual outcome, appellant had placed himself in a situation where conflicting loyalties could affect his professional judgment. Id. at 267.

The analogy is clear: in the instant case, the interests of Shea Gould's union clients pointed towards limiting the union's exposure to liability while the interests of the plaintiff female office cleaners pointed towards the widest possible relief under all possible statutes and against all possible parties, including the union.

The authorities cited by Shea Gould are not to the contrary. International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975) presented the "narrow issue [of] whether a former partner in a law firm who is a party defendant in a lawsuit growing out of his former activities as a member of the law firm is barred from retaining the law firm as trial counsel because he will have to be a witness at the trial." Id. at 1293. It is difficult to see how this question is related to the present appeal, which involves the problem of dual representation. The quotation cited by Shea Gould,[97] cautioning against

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107. Apps.' Brief at 34.

a "mechanical and didactic" approach[98] is certainly applicable. However, that suggestion does not militate in favor of reversal of the district court's opinion. A flexible and realistic approach to ethical problems does not obviate the necessity for analysis of the problem or for disqualifcation where required, in circumstances like the present one.

Shea Gould also cites[99] Rosario v. The New York Times Co., ___F.Supp.___, 10 E.P.D. ¶¶ 10,450 and 10,576 (S.D.N.Y. 1975) as the "most closely" analogous case. There, the court found that it "need not decide the issue of potential conflict," 10 E.P.D. at p. 5947, because the union was stricken as a party plaintiff. Accordingly, the court's later statement, upon which Shea Gould relies, that "I saw no conflict of interest," 10 E.P.D. at p. 6380, is somewhat mysterious. The court never reached the conflict issue and never made any findings on that issue; the relevance of the case to the present one is therefore questionable.[100]

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98. Judge Gurfein's concurrence in J.P. Foley Co., Inc. v. Vanderbilt, 523 F.2d 1357 (2d Cir. 1975) is cited for the same proposition.

99. Apps.' Brief at 37-38.

100. Shea Gould's reliance in the defendants' briefs in Communication Workers of America v. New York Telephone Co., supra, is likewise misplaced. See n. 79, supra.

Shea Gould apparently believes that the district court's order disqualifying them in this case, if affirmed, will cripple a union member's ability to obtain competent counsel retained or referred by their union, a right which is said to be guaranteed under United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967) and other similar cases.[101] Those cases stand for the general proposition that a union's retention of counsel to assist its members, or the use of an attorney referral system for the same purpose, cannot be totally prescribed without violating union members' First Amendment rights. That proposition has never been challenged in this case, nor would it now be offended by this Court's affirmance of the district court's order.

Even the authorities cited by Shea Gould recognize that the United Mine Workers case does not grant a license to a union's general counsel to engage in blatantly unethical conduct under the guise of freedom of association. The New York State Bar Association's Committee on Professional Ethics, in Opinion #163,[102] specifically states that

> [e]very court opinion should be construed in the light of the facts before it. The broad language

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101. Apps.' Brief at 33 and 35.

102. Apps.' Brief at 35-36.

> of the Supreme Court [in Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia Bar Ass'n., 377 U.S. 1 (1964)] cited above should not be so broadly construed as to destroy the fundamental freedom inherent in the right of members of the public to have independent counsel whose loyalty is wholly to the client and not to an intermediary whose economic power permits it to control or strongly influence the judgment of the lawyer.
>
> Labor unions, trade associations, stock exchanges and other concentrations of economic power, if permitted to supply free legal services to their members in every area of interest to their members, could conceivably control the economic life of large numbers of lawyers who could become puppets of their employers to whom they would owe primary allegiance rather than servants of their clients. It is doubtful that the Supreme Court, in spite of the breadth of the language it used in connection with the Railroad Trainmen's legal referral service, intended to abolish the right of states and the bar to preserve the public's right to the loyalty of independent counsel.

See also In Re Gopman, supra at 268.

Of course, plaintiff-intervenor has never argued that a union's general counsel may never represent its members, i.e., in situations where the union itself has no potential liability. The point here is that such a relationship must be judged by the ordinary ethical standards applicable to all other attorney-client relationships. A union's general counsel cannot be excused from its ethical obligations merely by virtue of its general retainer by the union.

Shea Gould defends its dual representation by alleging

that the union has no liability and therefore has no interests in conflict with those of the Nurse plaintiffs. By making such an argument, they have demonstrated the very basis of the conflict: their loyalty to Local 32J precludes them from recognizing and arguing the potential liability of Local 32J for the alleged discrimination. An independent advocate, with an obligation only to the Nurse plaintiffs, would have pressed all possible claims against all possible defendants in order to assure the greatest possibility of success and the fullest measure of recovery. Shea Gould has not behaved like such an advocate, and in fact has repeatedly attempted to exonerate Local 32J.

III. The District Court's Order Is Supported by the Evidence and Should Be Affirmed

On the basis of the hearings held on February 17, 18, March 5, 11, and 12, 1976, as well as other evidence properly before the court, the district court found the following facts[103] in support of disqualification:

1. "Shea Gould concedes that it has been general counsel since at least 1959 to Local 32J, third party defendant in this case;"

2. "it was upon the advice of Shea Gould that the Union advised its members to proceed under the Equal Pay Act against the employers instead, for example, of proceeding under Title VII against the Union as well;"

3. the "collective bargaining agreements prior to 1971 are admittedly discriminatory on their face .... in the post-1971 collective bargaining agreements, the separate job categories which are substantially sex segregated and for which different pay scales are provided, at least raise questions of discrimination;"

4. "Shea Gould advised [President Baumann] of the potential claims by the employers against the Union;"

5. "Baumann testified that the Union members 'resolved ... [to] authorize an assessment against [themselves] to indemnify the Union for any [liability on the cross claims]';"

6. "Shea Gould and not the separate counsel hired by Local 32J for the Equal Pay Act litigation represented Local 32J as well as the equal pay plaintiffs in all of the negotiations for settlement of the cases;"

7. "[t]he first settlement proposal, which did not provide for immediate equal pay, was found to be

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103. The quotations are from the District Court Opinion, pp. 9-14, Supp. A. 9-14.

unacceptable by the United States Department of Labor .... The settlement did provide, however, for dismissal of the cross-claims against the union;"

8. Local 32J and the Nurse plaintiffs had "clear divergent interests .... [Local 32J] had an interest in obtaining defendants' withdrawal of the cross-claims .... for plaintiffs, such an interest did not exist."

Based on the foregoing, the district court concluded:

1. "the initial decision not to place the plaintiff Union members in an adversary role with the Union by foregoing claims against the Union was made by a firm with at least the appearance of a conflict;"

2. "[a]s signatories to the [collective bargaining] agreements, the Union can be liable for discrimination;"

3. "the potential liability of the Union for the discrimination which is charged to have arisen by virtue of the collective bargaining agreements appears to this court to present conflicting interests between the two parties;"

4. "Shea Gould's representation of both plaintiffs and the Union during settlement negotiations entailed the representation of two parties with clear divergent interests;"

5. "[t]he clear possibility exists that Shea Gould negotiated a settlement less favorable to plaintiffs than might otherwise have been obtained in return for dismissal of the cross-claims. Such a possibility, combined with the fact that the initial agreement was deemed inadequate by the Department of Labor, presents what we believe to be evidence of a conflict of interest."

This Circuit has held that "[t]he district court bears the responsibility for the supervision of the members of its

bar. The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place." Hull v. Celanese Corp., supra, at 571 (citations omitted). See also, W.T. Grant Co. v. Haines, 531 F.2d 671, 676 (2d Cir. 1976): "We have consistently held that the remedy of disqualification rests solely in the discretion of the district court and its determination will only be upset upon a showing of abuse;" Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1140 (2d Cir. 1975); and In Re Gopman, supra at 266.

The district court's findings are amply supported in the record. It is beyond question that disqualification in this case did not constituted "an abuse of discretion." It was, in fact, "a necessary and desirable remedy ... to enforce the lawyer's duty of absolute fidelity ...." Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). In such a situation, "[t]he district court had the duty to rescue both the lawyer and his client." In Re Gopman, supra, at 268. The order should be affirmed.

IV. The Order of Disqualification Should Not Be Vacated As Moot

The district court's order was clearly not moot when entered on February 18, 1976. The Nurse and Willis settlements had not been presented to the court for approval, and the district court had good cause for concern that Shea Gould's conflicting interests might continue to interfere with the processing of the cases.[104]

More importantly, the district court has yet to resolve the question of Shea Gould's right to receive the $300,000 attorneys' fees provided in the Nurse settlement, which can only be awarded after approval of the district court. As the district court noted: "we have been charged by the parties in their settlement with the task of assessing whether the amount allocated as attorney's fees is proper, [and] we must look, for example, to the time spent by counsel as an advocate for its clients. If Shea Gould was in a position of conflict we will have to determine whether the hours for which payment is sought reflects work on behalf of plaintiffs or on behalf of

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104. In view of Shea Gould's request on February 24, 1976 to the Court of Appeals for the opportunity to present additional evidence on the disqualification issue, notwithstanding the recognition that the Nurse case would be settled within three days following that request, their position that the matter is moot is somewhat anomalous. Even assuming arguendo that the matter is now moot, that would indicate only that the appeal should be dismissed as moot, not that the district court's order should be vacated.

the third party defendant Union."[105]

Thus, the question of Shea Gould's conflicting interests is still very much alive, and must be resolved before a decision on attorneys' fees is reached. Similarly, the conflict issue is pertinent to a determination of the validity of that portion of the consent to sue forms[106] authorizing Shea Gould to receive attorneys' fees from the individual union members:

> I furthermore, hereby retain, employ and authorize the law firm of Shea Gould Climenko and Kramer to prosecute my claims for equal pay. I agree to pay said law firm for its services in connection with the recovery of said wages due for equal work an amount equal to twenty-five per cent (25%) of whatever amount is recovered for me, by compromise or otherwise. If the Court in any suit brought pursuant to this agreement renders a judgment in which there is included an allowance of counsel fees to the law firm of Shea Gould Climenko and Kramer, this amount of said allowance shall be applied in dimunition of the aforesaid attorney's fees.

Serious questions exist regarding the enforceability of this payment provision against women who, when they signed the retainer, had not been informed of any potential conflict on the part of their attorneys. Resolution of the disqualification issue is essential to this determination. As stated above, plaintiff-

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105. Supp. A. 7 (District Court Opinion).

106. A. 162.

intervenor vigorously opposes any such assessment against the Nurse plaintiffs because of her contention that Shea Gould consistently advocated the union's interest, at the expense of the Nurse plaintiffs, whenever their interests diverged. The Nurse plaintiffs should not be required to pay for Shea Gould's failure to render adequate services.[107] In contrast, since it appears[108] that the employers set a dollar limit on the cost of the new contract, which amount could be approtioned in any number of ways, the $300,000 which was apportioned as Shea Gould's attorneys' fees should be divided up equally among all members of Local 32J if Shea Gould's disqualification for conflict of interests is affirmed.

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107. Nor should they pay Shea Gould separately for their services in negotiating collective bargaining agreements, since they have already paid union dues, which have been and should be used for that purpose. It is clear that Shea Gould's activities in the equal pay cases was largely as a negotiator for Local 32J in the collective bargaining agreements.

108. Apps.' Brief at 16.

CONCLUSION

WHEREFORE, plaintiff-intervenor, as amicus curiae, respectfully requests that the District Court's Order be affirmed in all respects, and that this Court grant such other and further relief as may be just and proper.

Respectfully submitted,

JOAN BERTIN LOWY
ISABELLE KATZ PINZLER
DIANA H. GREENE
ROBERT P. ROBERTS
NATIONAL EMPLOYMENT LAW PROJECT, INC.
423 West 118th Street
New York, New York 10027

Attorneys for Plaintiff-Intervenor
Darlene K. Willis

Dated: New York, New York
June 28, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA NURSE, et al., Plaintiffs-Appellants,	
DARLENE K. WILLIS, individually and on behalf of all others similarly situated, Plaintiff-Intervenor,	AFFIDAVIT OF SERVICE
-against-	76-7062
ALLIED MAINTENANCE CORPORATION, et al., Defendants.	
SHEA GOULD CLIMENKO KRAMER & CASEY, Appellants.	

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JOAN BERTIN LOWY being duly sworn deposes and says:

1. Deponent is not a party to this action, is over 18 years of age and resides in New York, New York.

2. On June 28, 1976 deponent served ~~two~~ one (1) copy JBL of Motion of Plaintiff-Intervenor Darlene K. Willis for Leave to File a Brief and Appear as Amicus Curiae, two (2) copies of Brief Amicus Curiae of Plaintiff-Intervenor Darlene K. Willis, and one (1) copy of the Supplemental Appendix upon Shea Gould Climenko Kramer and Casey, attorneys for Plaintiff-Appellants in this action, at 330 Madison Avenue, New York, New York 10017

by mailing true copies of same United States first class postage post-paid.

Joan Bertin Lowy
JOAN BERTIN LOWY

Sworn to before me this
28th day of June, 1976

Diana H. Greene
Notary Public

DIANA H. GREENE
Notary Public, State of New York
[illegible]
Qualified in Kings County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 76-7062 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA NURSE, et al.,

Plaintiffs-Appellants,

DARLENE K. WILLIS, individually and on behalf of all others similarly situated,

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-against-

ALLIED MAINTENANCE CORPORATION, et al.,

Defendants.

SHEA GOULD CLIMENKO KRAMER & CASEY

Appellants.

AFFIDAVIT OF SERVICE

JOAN BERTIN LOWY, ISABELLE KATZ PINZLER, DIANA H. GREENE & ROBERT P. ROBERTS,

*Attorney*S *for* PLAINTIFF-INTERVENOR

Office and Post Office Address, Telephone

National Employment Law Project, Inc.
423 West 118th Street
New York, N. Y. 10027
(212) 866-8591

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1500-© 1973, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N. Y. 4

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath